

IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
GALLATIN RIVER BASIN (41H)
PRELIMINARY DECREE

* * * * *

CLAIMANTS: Peter Zeliff; Terry M. Fluke Revocable Family
Trust

CASE 41H-6003-A-2022

41H 25622-00

41H 25623-00

41H 25624-00

41H 25625-00

41H 30153405

NOTICE OF FILING OF MASTER'S REPORT

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusions of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must serve a copy of the objection to all parties on the service list found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

MASTER'S REPORT

On June 3, 2022, Terry McFarland Fluke, Trustee of the Terry McFarland Revocable Family Trust, Dated March 13, 2017, with Peter Zeliff, filed a Verified Motion to Amend, Split, and Sever Water Rights. The Motion attached several DNRC forms that were previously submitted but overlooked by the Court during Water Court Case 41H-0844-R-2022. Mary Crable of the Bozeman DNRC also submitted a memorandum with the proposed splits and severances.

FINDINGS OF FACT

1. Claimants request the place of use for claims 41H 25622-00 and 41H 25623-00, 41H 25624-00, and 41H 25625-00 be reduced by 40 acres. The original statement of claims showed the 40 acres in the SWNW Sec. 15, Twp. 3S, Rge. 4E. However, the chain of title for the underlying property shows that the claimant Milon Dickerson never owned the 40 acres in the SWNW Sec. 15.

2. The Court notified the potential owners of the property in the 40 acres in the SWNW Sec. 15 of the Motion and stated if no response was filed, it would conclude the individual owners agree the claims should have the acres removed from the places of use. No responses were filed.

3. After the removal of 40 acres from the places of use for claims 41H 25622-00 and 41H 25623-00, 41H 25624-00, and 41H 25625-00, the parties agreed the Trust conveyed claim 41H 25622-00 in its entirety to Zeliff. The parties agreed the Trust would reserve claims 41H 25623-00 and 41H 25624-00 in their entireties. The parties further agree to split claim 41H 25625-00.

4. From parent claim 41H 25625-00, claim 41H 30153405 should be created. The original claim number shall remain in the name of Terry McFarland Revocable Family Trust and reflect the original portions of the claim it is retaining. New claim 41H 30153405 shall be in the name of Peter Zeliff and reflect the portions of the claim that it is retaining and severed from its place of use.

5. The elements for claim 41H 25625-00 that changed from the split and sever are:

OWNER: Terry McFarland Revocable Family Trust

FLOW RATE: ~~1.06 CFS~~ **420.75 GPM**

MAXIMUM ACRES: ~~140.00~~ **58.0**

PLACE OF USE:

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	100.00	58	N2 SW	15	3S	4E	GALLATIN
2	40.00		S2 NW	15	3S	4E	GALLATIN
Total:	140.00	58					

6. The following remark should be added to the abstract of claim 41H 25625-00:

SPLIT CLAIM NUMBER 41H 30153405 WAS AUTHORIZED AND GENERATED BASED ON INFORMATION IN THIS CLAIM.

7. The elements for claim 41H 30153405 are identical to claim 41H 25625-00 except for the following changes:

OWNER: PETER ZELIFF

FLOW RATE: ~~1.06 CFS~~ **56.1 GPM**

MAXIMUM ACRES: ~~140.0~~ **42.0**

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	100.00	42	S2 SW	15	3S	4E	GALLATIN
2	40.00		S2 NW	15	3S	4E	GALLATIN
Total:	140.00	42					

8. The following remark should be added to the abstract of claim 41H 30153405:

THIS SPLIT CLAIM WAS AUTHORIZED BY THE WATER COURT BASED ON INFORMATION IN CLAIM NO. 41H 25625-00.

9. The following remark should be added to the legal land description on the abstract of claims 41H 25623-00 and 41H 25624-00:

THIS WATER RIGHT HAS BEEN SEVERED FROM THE PLACE OF USE.

CONCLUSIONS OF LAW:

1. The Montana Water Court has jurisdiction over all matters relating to the determination of existing water rights and may consider any matter within the Court's jurisdiction on its own motion, or on the motion of an interested party. Section 3-7-224, MCA.

2. A properly filed Statement of Claim for Existing Water Right is prima facie

proof of its content. Section 85-2-227, MCA. This prima facie proof may be contradicted and overcome by other evidence that proves an element of the prima facie proof is incorrect. This is the standard of proof for every assertion that a claim is incorrect including claimants objecting to their own claims. Rule 19, W.R.Adj.R.

3. Montana law allows claimants to amend their statements of claim, and objectors to amend their timely filed objections after the objection period in a basin has closed. Motions to amend a claim or objection are governed by Section 85-2-233(6), MCA:

(6) After the issuance of a temporary preliminary decree or preliminary decree, notice of any motion to amend a statement of claim or a timely filed objection that may adversely affect other water rights must be published for 3 consecutive weeks in two newspapers of general circulation in the basin where the statement of claim or objection was filed. The notice must specify that any response or objection to the proposed amendment must be filed within 45 days of the date of the last notice. The water judge may order any additional notice of the motion as the water judge considers necessary. The cost of notice required pursuant to this subsection must be borne by the moving party.

4. If a claimant agrees to reduce or limit an element of a claim, the Water Court does not need to determine whether the burden of proof has been met. The Water Court may accept a claimant's requested reduction or limitation without further presentation of evidence. Rule 17(c) W.R.Adj.R.

5. If a claimant, objector, or intervenor fails to appear at a scheduled conference or hearing, or fails to comply with an order issued by the water court, the water court, upon motion, or its own initiative, may issue such orders of sanction with regard thereto as are just. Rule 22, W.R.Adj.R.

6. Claimant's Amendment removed 40 acres from each of the claims which resulted in a reduction of the claims. No required publication and service of the requested amendment or evidence was needed to remove the acres; however Claimants provided a chain of title supporting the removal. The potential owners of the claim were given an opportunity to object to the removal of the acres from the POU, but no response was filed.

7. The Montana Water Court may split claims into separate claims at any time prior to the final decreed upon request of the claimants, or on its initiative. Rule 26,

W.R.Adj.R.

8. The splitting of claim 41H 25625-00 does not constitute an increase to any of the claims' elements. The split only serves to reflect, more accurately, the current proportional ownership of the claimed place of use and flow rate. As a result, the notice requirements found in Section 85-2-233(6), MCA do not apply.

9. The right to use water shall pass with a conveyance of the land or transfer by operation of law, unless specifically exempted therefrom. Section 85-2-403, MCA.

10. The evidence entered into the record regarding the current ownership of the claimed place of use and flow rate is sufficient to accurately split claim 41H 25625-00 as stated in the Findings of Fact.

10. The severance of claims 41H 25623-00 and 41H 25624-00 occurred through property transfer deeds which expressly and impliedly reserved portions of the water rights appurtenant to the underlying property.

RECOMMENDATIONS:

Therefore, pursuant to section 85-2-233(6), MCA, it is recommended that the Motion to Amend, Split and Sever the respective statements of claims be GRANTED.

New Post Decree Abstract of Water Right Claim 41H 30153405 should be created to reflect the proportional use of the above identified co-owners. All Updated Post Decree Abstracts of Water Right Claims are served with this Report to confirm the recommended changes have been made in the state's centralized water right record system.

ELECTRONICALLY SIGNED AND DATED BELOW.

Service via USPS Mail:

Marjorie Black
578 Concord Drive
Bozeman, MT 59715

Peter Zeliff
4655 E Saile Dr
Batavia, NY 14020

Potential owners:
John E. & Merianne D. Ross
2190 Gateway South Rd
Gallatin Gateway, MT 59730-9793

Robert John Mikkelson
2188 Gateway South Rd
Gallatin Gateway, MT 59730-9793

Potential Owners:
Carrie Dickerson-Mikkelson
2230 Gateway South Rd
Gallatin Gateway, MT 59730-9796

Miranda Ann & Dennis E. Johnson Jr
2186 Gateway South Rd
Gallatin Gateway, MT 59730-9793

Melissa Ann Mikkelson
3737 Sly Rd
Helena, MT 59602-6045

Benedict W. Fluke
Edward Scott Fluke
2900 Gateway Rd S.
Gallatin Gateway, MT 59730-9705

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
GALLATIN RIVER
BASIN 41H**

Water Right Number: 41H 25622-00 STATEMENT OF CLAIM
Version: 5 -- POST DECREE
Status: ACTIVE

Owners: PETER ZELIFF
4655 E SAILE DR
BATAVIA, NY 14020

Priority Date: JUNE 1, 1883

Type of Historical Right: DECREED

Purpose (use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 282.74 GPM

***Volume:** THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 4 - MODERATELY LOW

Maximum Acres: 58.00

Source Name: WEST GALLATIN RIVER

Source Type: SURFACE WATER

***Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SENWNW	22	3S	4E	GALLATIN
Period of Diversion:	APRIL 1 TO OCTOBER 31					
Diversion Means:	HEADGATE					
Ditch Name:	NOBLE DITCH					
Period of Use:	APRIL 1 TO OCTOBER 31					
Place of Use:						

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	58.00		N2SW	15	3S	4E	GALLATIN
Total:	58.00						

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
GALLATIN RIVER
BASIN 41H**

Water Right Number: 41H 25623-00 STATEMENT OF CLAIM
Version: 4 -- POST DECREE
Status: ACTIVE

Owners: FLUKE, TERRY M REVOCABLE FAMILY TRUST
2900 GATEWAY S RD
GALLATIN GATEWAY, MT 59730

Priority Date: JUNE 1, 1879

Type of Historical Right: DECREED

Purpose (use): IRRIGATION

Irrigation Type: FLOOD

***Flow Rate:** 112.20 GPM
FLOW RATE EQUALS 10 MINER'S INCHES.

***Volume:** THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 4 - MODERATELY LOW

Maximum Acres: 42.00

Source Name: WEST GALLATIN RIVER

Source Type: SURFACE WATER

***Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr</u>	<u>Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>	
1		SEN	WNW	22	3S	4E	GALLATIN	
Period of Diversion: APRIL 1 TO OCTOBER 31								
Diversion Means: HEADGATE								
Ditch Name: NOBLE DITCH								
Period of Use: APRIL 1 TO OCTOBER 31								
Place of Use:								
<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>	
1	42.00		S	2SW	15	3S	4E	GALLATIN
Total:		42.00						

THIS WATER RIGHT HAS BEEN SEVERED FROM THE PLACE OF USE.

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
GALLATIN RIVER
BASIN 41H**

Water Right Number: 41H 25624-00 STATEMENT OF CLAIM
Version: 5 -- POST DECREE
Status: ACTIVE

Owners: FLUKE, TERRY M REVOCABLE FAMILY TRUST
2900 GATEWAY S RD
GALLATIN GATEWAY, MT 59730

Priority Date: JUNE 1, 1866

Type of Historical Right: DECREED

Purpose (use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 224.40 GPM

***Volume:** THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 4 - MODERATELY LOW

Maximum Acres: 42.00

Source Name: WEST GALLATIN RIVER

Source Type: SURFACE WATER

***Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SENWNW	22	3S	4E	GALLATIN
Period of Diversion:	APRIL 1 TO OCTOBER 31					
Diversion Means:	HEADGATE					
Ditch Name:	NOBLE DITCH					
Period of Use:	APRIL 1 TO OCTOBER 31					
Place of Use:						

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	42.00		S2SW	15	3S	4E	GALLATIN
Total:	42.00						

THIS WATER RIGHT HAS BEEN SEVERED FROM THE PLACE OF USE.

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
GALLATIN RIVER
BASIN 41H**

Water Right Number: 41H 25625-00 STATEMENT OF CLAIM
Version: 5 -- POST DECREE
Status: ACTIVE

Owners: FLUKE, TERRY M REVOCABLE FAMILY TRUST
2900 GATEWAY S RD
GALLATIN GATEWAY, MT 59730

Priority Date: JUNE 1, 1882

Type of Historical Right: DECREED

Purpose (use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 420.75 GPM

***Volume:** THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 4 - MODERATELY LOW

Maximum Acres: 58.00

Source Name: WEST GALLATIN RIVER

Source Type: SURFACE WATER

***Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SENWNW	22	3S	4E	GALLATIN

Period of Diversion: APRIL 1 TO OCTOBER 31

Diversion Means: HEADGATE

Ditch Name: NOBLE DITCH

Period of Use: APRIL 1 TO OCTOBER 31

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	58.00		N2SW	15	3S	4E	GALLATIN
Total:	58.00						

Remarks:

SPLIT CLAIM NO. 41H 30155788 WAS AUTHORIZED AND GENERATED BASED ON INFORMATION IN THIS CLAIM.

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
GALLATIN RIVER
BASIN 41H**

Water Right Number: 41H 30155788 STATEMENT OF CLAIM

Version: 1 -- ORIGINAL RIGHT

Status: ACTIVE

Owners: PETER ZELIFF
4655 E SAILE DR
BATAVIA, NY 14020

Priority Date: JUNE 1, 1982

Type of Historical Right: DECREED

Purpose (use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 56.10 GPM

Volume: THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 4 - MODERATELY LOW

Maximum Acres: 42.00

Source Name: WEST GALLATIN RIVER

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SENWNW	22	3S	4E	GALLATIN

Period of Diversion: APRIL 1 TO OCTOBER 31

Diversion Means: HEADGATE

Ditch Name: NOBLE DITCH

Period of Use: APRIL 1 TO OCTOBER 31

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	42.00		S2SW	15	3S	4E	GALLATIN

Total: 42.00

Remarks:

THIS SPLIT CLAIM WAS AUTHORIZED BY THE WATER COURT BASED ON INFORMATION IN CLAIM NO. 41H 25625-00.